

Ballot Paper (Form 7) the name which the candidate wished to be described as set out in Form 3.

What the petitioners have sought to do is to assert that the returning officer possessed the necessary power for which our election laws do not provide.

I am of opinion and I so hold that the returning officer was right in rejecting the nomination papers of petitioner No. 1 as well as petitioner No. 2.

On the evidence so given and facts so found it is my view that the returning officer proceeded with utmost *bona fides* and impartiality.

Before departing from the case two observations fail to be made.

I would quote the following from *Srivastava* on Law of Elections, Volume II at page 267:—

"In this connection the following observations of an Election Tribunal in the case *Hari Das v. Hira Singh Pal*⁽¹⁾ — may be usefully reproduced —

'Law reports on election cases, both in India and England are replete with cases, where election petitions have failed on account of their defective drafting. It is a sad commentary on the legal profession that a large number of election petitions should be dismissed, or some paragraphs of the petition be struck off for haphazard drafting. Election law is a special law and a specialized knowledge is required to bear upon the subject....

It is the duty of the lawyer to be thoroughly conversant with the election law, and avoid drafting the petition in careless and casual manner. It is perfectly true that some defects cannot entirely be eliminated even by the most skilful, but, on the other hand, a larger number of them arise from perfectly avoidable slipshodness and want of precision in thought, legal knowledge and expression. Hence scrupulous and meticulous care is needed in drafting election petitions'."

It is suggested and I do not propose to say, one way or the other, whether I agree with the suggestion that there is nothing to prevent petitioners putting in another nomination paper with the correct entries before the closing time for receiving nomination papers.

That really concludes the determination of the matters that I have to decide in both election petitions.

In my view for the reasons given, the preliminary objection must succeed and the petitions fail on the question of merit.

I therefore determine that the respondents were duly elected and I shall so report to the Election Commission.

The petitions are accordingly dismissed with costs.

Petitions dismissed.

CHAN LOO KHEE v. LAI SIEW SAN & ORS.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.J.J.) January 18, 1971]

[Ipoh — Federal Court Civil Appeal No. 84 of 1970]

Negligence — Motor vehicle parked by side of road at night with tail lights on — Whether driver can reasonably foresee that accident would result — Whether any duty to keep a proper and adequate look-out.

In this consolidated action, three motor cars were involved in an accident near Tanjong Malim where the road was straight and of good width. One of the cars was a Volkswagen driven by a schoolmaster who was returning home

after a holiday in Kuala Lumpur. The second car was an Opel proceeding in the opposite direction towards Kuala Lumpur. The third car was a Fiat bound for Kuala Lumpur which the trial judge found as a fact to be stationary on the carriage-way at the time of the accident. The learned trial judge found that the Fiat car was so parked with its side lights on, but held that "in this position and in the circumstances of the accident, it could not and did not constitute such an obstruction to the Opel as to have contributed to the accident." He found the driver of the Opel wholly to blame for the accident and dismissed the claim for contribution by the driver of the Opel against the driver and owner respectively of the Fiat as third parties. On appeal,

Held, dismissing the appeal (Gill and Ali F.J.J., Ong C.J. dissenting): in the circumstances of this case the driver of the Fiat motor car was not guilty of negligence in parking his Fiat car on the road side with its parking lights on, as he could not have reasonably foreseen that his act in doing so would cause the accident, and therefore the learned trial judge was right in holding that the driver of the Opel car was wholly to blame for the accident.

Observations on meaning of negligence.

Cases referred to:—

- (1) *Donoghue v. Stevenson* [1932] A.C. 562, 580.
- (2) *Brown v. Thompson* [1968] 1 W.L.R. 1003, 1008.
- (3) *The Miraflores and the Abadesa* [1967] 1 A.C. 826, 845.
- (4) *The Wagon Mound* [1961] A.C. 388, 426.
- (5) *Hughes v. Lord Advocate* [1963] A.C. 837, 845.
- (6) *Harvey v. Road Haulage Executive* [1952] 1 K.B. 120, 122.
- (7) *Blyth v. Birmingham Waterworks Co.* (1856) 11 Exch. 781, 784.
- (8) *Fardon v. Harcourt-Rivington* (1932) 146 L.T. 391, 392.
- (9) *Bourhill v. Young* [1942] 2 All E.R. 396, 403.
- (10) *Glasgow Corporation v. Muir* [1943] A.C. 448.
- (11) *Bolton v. Stone* [1951] 1 All E.R. 1078, 1081.
- (12) *London Passenger Transport Board v. Upson* [1949] A.C. 155, 173.
- (13) *Berrill v. Road Haulage Executive* [1952] 2 Lloyd's Rep. 490, 492.
- (14) *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156, 173.
- (15) *Haley v. London Electricity Board* [1965] A.C. 778.
- (16) *Vancouver General Hospital v. McDaniel & Anor.* (1935) 152 L.T. 56, 57.
- (17) *Henley v. Cameron* (1949) 65 T.L.R. 17, 18.
- (18) *Hill-Venning v. Beszant* [1950] 2 All E.R. 1151.
- (19) *Morris v. Luton Corporation* [1946] K.B. 114.
- (20) *Davis v. Mann* (1842) 10 M. & W. 546, 152 E.R. 588.
- (21) *Boy Andrew (Owners) v. St. Rognvald (Owners)* [1948] A.C. 140.
- (22) *Davies v. Swan Motor Co. (Swansea) Ltd.* [1949] 2 K.B. 291.
- (23) *Grant v. Sun Shipping Co. Ltd.* [1948] A.C. 549, 563.
- (24) *The Volute* [1922] 1 A.C. 129.
- (25) *Swadling v. Cooper* [1931] A.C. 1.
- (26) *The Bywell Castle* (1879) L.R. 4 P.D. 219.
- (27) *Kelly v. W.R.N. Contracting Ltd. & Anor. (Burke, third party)* [1968] 1 W.L.R. 921.

FEDERAL COURT.

Lim Kean Chye (Lim Ewe Hock and C. W. M. Abraham with him) for the appellant.

P. P. Dharmaranda for the respondents 1-8.

K. A. Menon for the respondents 9 and 10

Cur. Adv. Vult. A

Ong C.J. (Malaya): From Tanjong Malim a high-speed thoroughway runs north for some 13 miles to the toll-gate at Slim River. At about 8 p.m. on April 10, 1967 three motor-cars were involved in a collision about 2 miles north of Tanjong Malim, where the road was straight and of a good width, 23 feet 9 inches.

One of the cars was a Volkswagen driven by a Kampar schoolmaster returning home with his wife and children and two female relatives after a holiday in Kuala Lumpur. The second car was an Opel proceeding in the opposite direction towards Kuala Lumpur. The third was a cream-coloured Fiat bound for Kuala Lumpur which the trial judge found as a fact to be stationary on the carriage-way at the time of the accident. Its driver and a passenger had stopped the car there to urinate. The judge further found that this Fiat car was so parked with its side-lights on, but held that "in this position and in the circumstances of this accident it could not and did not constitute such an obstruction to the Opel as to have contributed to the accident". In the result the claim to contribution by the defendant driver of the Opel against the driver and owner of the Fiat as third parties was dismissed and the defendant was held solely liable for damages claimed by the various plaintiffs in the consolidated action. The defendant now appeals against such decision on the ground that the trial judge's conclusion as to the distribution of fault between himself and the third parties was erroneous.

At the outset let it be said that no one quarrels with the judge's finding of fact that the driver of the Volkswagen was wholly free from blame for the collision which caused his own death and the death of his infant daughter. He was homeward bound — having no reason to travel at high speed — and naturally careful about the safety of his family travelling with him.

The driver of the Fiat stoutly affirmed that when he stopped his car he had driven off the road altogether, so that all its four wheels were on the grass verge. If that were so there can be no question whatever that he shared none of the blame, since his vehicle left the whole 23 feet 9 inches of the carriage-way free of any obstruction. In that event it was also wholly immaterial whether the Fiat had any lights on.

The judge, however, did not believe he told the truth, but instead found as a fact that he had parked the car on the road. From that premise, he went on to consider whether the Fiat thereby constituted "an obstruction which contributed to the accident". On this point he appears to have taken the view that the Fiat must have been picked out by the headlights of the two cars approaching from both sides, so that "if the defendant had kept a proper or adequate look-out he would have seen this car. If he did not see it until so late (as 30 to 40 yards away) it must be that he did not keep a proper look-out". On this ground and this ground alone the judge then came to the conclusion that the Fiat was not such an obstruction to the Opel as to have contributed to the accident.

With the greatest respect I find myself unable to accept that conclusion. It is true that, on the evidence and the admission of the defendant himself that he did not see the Fiat until it was too close for him to pull up behind it, the defendant was at fault in failing to keep an adequate look-out. Nevertheless, it does not alter the fact that, had the Fiat been parked on the grass verge, instead of on the road, the collision between the Volkswagen and the Opel could not possibly have occurred. There is no escaping the fact that it was the presence of the stationary Fiat on the road — "blocking my way" as the defendant vividly put it — which caused the defendant to swerve to the right and, as he went on to admit, encroach on the path of the oncoming car, while trying to keep as close as possible to the stationary Fiat and taking a chance of scraping through.

What in my opinion is more important than the simple finding of the Fiat being parked on the road is: *How far was it parked from the edge of the road?* Here the finding of fact as to the former necessarily involves a conclusion as to the latter. I now quote the relevant passage from the judgment: —

"Assuming that the brake mark FE, the scratch mark JK and the scratch mark MN, were made firstly by the off-side tyres of the Opel and secondly by the offside parts of the Opel after the collision, it is reasonably clear that at no point after F, if one takes into account the width of the Opel which was given as 5' 6", did the Opel reach nearer than 9' 3" from the Fiat's side of the road. It could not therefore have swerved into the Fiat if the Fiat was positioned on the grass verge. On this one consideration alone I must come to the conclusion and I therefore so find that the Fiat was not in fact, despite the testimony of the third party, parked on the grass verge. It was parked on the road. This finding of mine I think will be understood if one bears in mind that the Opel did not run into the rear of the Fiat but swiped it on its side".

An examination of the sketch plan is helpful, but not indispensable. The road is 3 inches short of 24 feet, so that the Opel's half was 12 feet. The Opel was 5 feet 6 inches wide and the Fiat 4 feet. The judge was perfectly satisfied that at no point after F, did the Opel reach nearer than 9 feet 3 inches from the Fiat's side of the road. Even so, the Opel could not manage to scrape through the opening between the Fiat and the Volkswagen. The joint width of the Fiat and Opel was 9 feet 6 inches. It follows, therefore, that, even if the Opel, while touching the Fiat, did not have to pass over the centre white line, the Fiat must have been parked fully 2 feet 6 inches from the edge of the road. But the defendant had clearly admitted being compelled to encroach over that line. Hence the inevitable conclusion should be that the Fiat was in fact parked, *a considerable distance more, than 2 feet 6 inches from the roadside*. In that position can it possibly be said that the Fiat presented no obstruction to the free passage of all vehicles proceeding north towards Tanjong Malim? To this question there can be only one answer.

If parking a car, however recklessly, so as to cause needless obstruction to other road-users, were to be held blameless, merely because other motorists could still have room to pass, *provided they kept a proper look-out*, then it would appear that the de-

liberate parking of a car anywhere, even in the middle of the highway, should be considered equally excusable, if not justifiable, regardless of the fact that, by reason of such obstruction, other motorists had come to grief by reason of their being not fully alert. In such cases there should, in my opinion, be proper apportionment of blame, depending on the circumstances. But, to exonerate the obstructionist completely — when it is undeniable that, but for the presence of the obstruction, there could not possibly have been an accident — is to ignore the principle of placing the blame fairly on those to be blamed for their acts or omissions. In this age of fast motor transport I think it is the duty of the courts to eschew excessive legalism and to require that every motorist should observe the golden rule of shewing due consideration for other road-users, or suffer the consequences of his failure to do so. This golden rule was enunciated by Lord Atkin in *Donoghue v. Stevenson*⁽¹⁾ as follows:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In multiple collisions, the principle to be applied in apportionment of blame is thus stated by Winn L.J. in *Brown v. Thompson*⁽²⁾: —

"When it is necessary for a court to ascribe liability in proportions to more than one person, it is well established that regard must be had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness. In *The Miraflores and The Abadesa*,⁽³⁾ Lord Pearce said: 'The investigation is concerned with "fault" which includes blameworthiness as well as causation. And no true apportionment can be reached unless both those factors are borne in mind.' It is worthy to note, I think, that that being a case where three ships had been involved in a collision, Lord Pearce said that what was essential was to compare the fault of each with the fault of the other two; the emphasis is upon fault, not solely upon causation of damage."

In the instant case I have no hesitation in describing the manner in which the Fiat was left on the road as disgraceful. Its driver gave evidence. He stated that the sketch plan showed where the Fiat was parked and it was as shown in the photograph "C". He denied he had moved this car *after* the accident. But the trial judge believed not a word of it and found as a fact that it had been parked on the road. Counsel on his behalf made no attempt to persuade this court that, in making this finding, the judge had erred in any way. More than that, I asked counsel not once, but three times, whether the Opel could possibly have run into the Volkswagen had the Fiat not been left on the road where it was that night. To these repeated questions there was no answer. I then ask myself: Why did the driver consider it necessary or expedient to remove the car on to the grass? Had it presented no obstruction to the Opel, why remove it at all, especially *after* an accident, when the driver must have known that police investigation would inevitably follow? Both the damaged vehicles having ended up as they did on

A the grass verge, the continued presence of the Fiat on the road could not possibly have contributed any further obstruction to the free flow of traffic than it did before the accident. The inference, therefore, which I draw from the driver's own conduct is that he realised he had to move the Fiat from the road in order to exculpate himself. And, since *after* the accident, he had no difficulty in parking his car on the grass, I see no reason why he should not have done so *before*. He must have known from observation that most cars travel over this 13-mile stretch at near-maximum speeds, and that to obstruct the carriage-way as he did would necessarily cause south-bound traffic to encroach over on the other side if sufficient clearance was to be allowed for the Fiat. No prudent motorist would overtake another vehicle at speed unless he can give the other a wide berth on his nearside in passing. All the more was parking on the road indefensibly senseless since the nearside grass verge was 15 feet wide and inviting. In my opinion it is impossible for the third parties to be wholly exonerated from blame. By obstructing the path of south-bound motor traffic and compelling the Opel to go perilously closer towards the oncoming Volkswagen, the collision was brought about which never could have happened but for the obstruction.

The question of the third parties' liability must now be considered. Was the parking of the Fiat a negligent act? On this point the law is now clearly laid down by their Lordships of the Privy Council in *The Wagon Mound*⁽⁴⁾ where Viscount Simonds said that "the essential factor in determining liability is whether the damage is of a kind as the reasonable man should have foreseen". In the instant case, there can be no doubt that the third party driver ought to have foreseen all south-bound vehicles being forced out towards the middle of the road or beyond when passing the Fiat. It seems to me no less foreseeable by any reasonable man that, if vehicles approaching from opposite directions had to meet and pass each other alongside or near the stationary Fiat, they would have to do so in perilous proximity with little clearance to spare. It follows that an accidental collision between such vehicles is equally foreseeable. It will now be pertinent to refer to *Hughes v. Lord Advocate*⁽⁵⁾ where a manhole left open in an Edinburgh street surrounded by paraffin lamps was left unguarded in the evening when the workmen went away for their tea-break. During their absence an eight-year old boy knocked one of the lamps into the manhole, causing an explosion and severe injury to him. In his judgment Lord Reid said: —

"I am satisfied that the Post Office workmen were in fault in leaving the manhole unattended and it is clear that *if they had done as they ought to have done* this accident would not have happened. It cannot be said that they owed no duty to the appellant."

In my view the same principles apply to the instant case. The third parties owed a duty of care to all other road users to take all reasonable precautions so as not to obstruct the free flow of traffic. It clearly was their failure to do so that caused or contributed to the accident.

I turn now to the relative blameworthiness of the defendant driver of the Opel. I suspect that he was understating his speed of travel, since 60 or 65 m.p.h. would have been more probable and still not unreasonable. Like the plaintiff in *Brown v. Thompson*⁽²⁾ he should have had no nagging thought of finding any stationary vehicle blocking his smooth progress. It is true that, on another test Opel, Mr. Pillay, the automobile engineer, said that in the full beam of its headlights he could see a white object at a distance of 890 feet, but, of course, he was on the alert to spot it. Here the defendant was taken very much by surprise. My own view is that what he or any other motorist in his place might reasonably have concluded, upon first noticing the Fiat on that stretch of the road ahead, was that it was another vehicle in motion. As Mr. Caplan, counsel for the plaintiff, argued in *Harvey v. Road Haulage Executive*,⁽⁶⁾ movement of the vehicle in front could only be judged by its relationship to other objects on or off the road and for this reason I venture to say that most motorists driving at night cannot instantly tell, upon first sighting the tail-lights of another in front, whether it is moving or stationary. It must therefore have taken a few seconds before the shattering truth dawned on the defendant that, of all things, another motorist had seen fit to park his car where it had no business to be. By the time he realised that the Fiat was blocking his path the gap between the vehicles had of course been rapidly closing. According to the table of Braking Tests in *Bingham's Motor Claims Cases* the stopping distance on dry asphalt surface of a car travelling at 60 m.p.h. — time lag not allowed for — is 172 feet. Even had the defendant been alert enough to notice the Fiat from a distance of, say, 250 yards, he could not have been more than 60-70 yards behind the Fiat after a lapse of, say, six seconds. What then should he have done in the agony of the moment? He decided, as he said, "to take a chance". Why he did so is not entirely free from doubt. It is at least clear that he could not pull up in time by reason of his slow reaction in failing to realise speedily enough that the Fiat was stationary. He was of course to blame. He then had two other choices of avoiding the risk of a head-on collision with the Volkswagen. He either could have elected to hit the Fiat from behind or gone on the grass, which was wide enough. But then there were two, if not more, of the Fiat passengers, behind or to the left of that car. The prevarications of the Fiat driver cannot but be against him as to where these passengers had disposed themselves around the car.

Having regard to what has been stated above and giving careful consideration both to the causative potency of the conduct of each party and their relative blameworthiness, I would hold the drivers of the Opel and Fiat 80 per cent. and 20 per cent. responsible for the unfortunate accident.

Gill F.J.: This is an appeal from a judgment of Chang Min Tat J. in which he held the appellant entirely to blame for an accident involving the appellant's Opel car and a Volkswagen car driven by one Teen Kim Teik, as a result of which accident the said Teen Kim Teik and his daughter named Diana Teen Soo Wan were killed and four other passengers in the

A Volkswagen including the deceased's wife named Lai Siew Sim (P.W. 1) received personal injuries. In the course of or just before the accident the Opel car had collided with a stationary Fiat car lying on its correct side of the road with its parking lights on and facing in the direction of Kuala Lumpur. The driver of the Fiat car was one Krishnasamy and its owner one Suppiah s/o Krishnasamy.

B The accident occurred at a place about two miles north of Tanjong Malim on a straight stretch of the Tanjong Malim/Slim River highway on April 10, 1967 at about 8 p.m. when Teen Kim Teik was driving his Volkswagen car in the direction of Ipoh and the defendant was travelling in his Opel car from the opposite direction towards Kuala Lumpur. As I have already said, the Fiat car was parked on the road side facing Kuala Lumpur, so that it stood in the path of the appellant's Opel car.

C The administrators of the estate of the two persons killed and the four parties injured in the accident brought six separate actions for damages against the appellant. In his statement of defence in each of the actions, the appellant as defendant denied liability and averred that the collision was caused and/or contributed to by the negligence of the said Teen Kim Teik deceased and/or the driver of the Fiat car. He therefore counter-claimed against the estate of the deceased driver for contribution, and subsequently brought in Krishnasamy and Suppiah as third parties on the allegation that by leaving his Fiat car unlit on the road Krishnasamy had caused an obstruction which accounted for the accident or largely contributed to it, thus claiming indemnity or contribution as against the third parties in respect of such sums as might be awarded to the plaintiffs or plaintiff in each of the six actions.

F By consent of the parties, the six actions were consolidated and heard together. Counsel for the parties having come to an agreement on quantum in respect of special and general damages in each of the actions, the consolidated actions proceeded to trial solely to determine the question of liability as between the parties involved in the accident.

G On the evidence produced before him, the learned trial judge found that the driver of the Volkswagen was in no way to blame for the accident. He therefore dismissed the defendant's counterclaim against the plaintiffs in Civil Suit No. 746 of 1968 as representatives of the estate of Teen Kim Teik deceased, and accordingly gave judgment for the plaintiffs or plaintiff in each of the six actions for the amounts which had been agreed upon between the parties. The appeal as against those plaintiffs, who are the first eight respondents to this appeal, having been withdrawn, that is the end of the matter insofar as the claim of the defendant for contribution from the estate of the deceased driver is concerned.

H As regards the defendant's claim for indemnity or contribution from the third parties, the learned trial judge found as a fact that the Fiat car was parked on the road side and not on the grass verge as claimed by the first third party, the ninth respondent to this

appeal. He also found as a fact that just before the accident the headlights of the Volkswagen were dipped but that the headlights of the Opel were undipped, with the result that whereas the driver and occupants of the Volkswagen were dazzled by the undipped lights of the Opel the defendant ought not to have been dazzled by the dipped lights of the Volkswagen, so that if P.W. 1 who was dazzled by the undipped headlights of the Opel car could see the side-lamps of the Fiat there was no reason for the defendant, undazzled as he was by the dipped headlamps of the Volkswagen, not to have noticed the Fiat with its lights on unless he had not been keeping a proper and adequate lookout. On those findings of fact and the inferences to be drawn therefrom, he concluded that the Fiat car was parked on the road with its side-lights on, and that in that position and in all the circumstances of the case, it could not and did not constitute such an obstruction to the Opel as to have contributed to the accident. He therefore dismissed the defendant's claim against the third parties.

Those findings of fact by the trial judge are not seriously challenged in this court, nor do I think they can possibly be challenged. The major ground of appeal as against the third parties, who are now the ninth and tenth respondents, is that, having found as a fact that the Fiat was parked on the road and not on the grass table, even though its tail-lights were on, the learned trial judge should have found that parking a car on the main trunk road between Tanjong Malim and Slim River, in all the circumstances of the case, was in itself a negligent act. It is said that the judge misdirected himself in considering the question of negligence of the first third party from only two aspects, namely, whether the Fiat "has constituted an obstruction which contributed to the accident" and whether the defendant could or should in the circumstances have seen the car. It is next said that the judge failed to take into consideration that the road was an unlighted express highway with no speed restriction, that the Fiat did not suffer any mechanical breakdown, that the first third party stopped his car only to urinate, that there was a 15-foot grass table with a hard surface on which the Fiat could and should have been parked, and that the third party should have known that there were cars coming from north and south when he parked his Fiat on the road. It is lastly said that the judge in effect applied the "last opportunity" rule and therefore erred in law.

Shorn of its verbiage, the memorandum of appeal boils down to the question whether the ninth respondent as the driver of the Fiat car was guilty of negligence in parking his Fiat car on the road side with its parking lights on, and if so, whether his negligence was a contributory cause of the accident. In other words, the question is whether the appellant's negligence, about which on the evidence as a whole there cannot be the slightest doubt, was the sole effective cause or was merely a contributory cause of the accident. In attempting to answer that question, it is necessary, at the risk of being tedious, to consider what negligence means, especially when counsel for the appellant commenced his argument by dealing with the general principles of negligence.

A Alderson B. in *Blyth v. Birmingham Waterworks Co.*⁽⁷⁾ defined negligence as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." In *Donoghue v. Stevenson*⁽¹⁾ Lord Atkin said that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour", and went on to describe as my neighbour "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question". In *Fardon v. Harcourt-Rivington*⁽⁸⁾ Lord Dunedin said:

C "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.... In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."

D Lord Macmillan in *Bourhill v. Young*⁽⁹⁾ said:

"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

E In *Glasgow Corporation v. Muir*,⁽¹⁰⁾ in which the decision turned on the standard of care, Lord Thankerton held that a person is bound to foresee only the reasonable and probable consequences of his failure to take care, judged by the standard of the ordinary reasonable man. Lord Macmillan agreed that the standard of duty was the reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts. Lord Clauson stated as the test whether the person having the duty of care ought, as a reasonable person, to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected.

G The above authorities as to what constitutes actionable negligence were reviewed in the more recent case of *Bolton v. Stone*⁽¹¹⁾ in which Lord Porter said: "It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."

H Lord Normand said (at page 1082):

"It is not the law that precautions must be taken against every peril that can be foreseen by the timorous."

I Lord Oaksey had this to say (at page 1083):

"The standard of care in the law of negligence is the standard of an ordinarily careful man, but, in my opinion, an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reason-

ably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation."

Lord Reid said (at page 1086):

"In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial."

Speaking of the duty of a driver of a motor vehicle, Lord Uthwatt in *London Passenger Transport Board v. Upson*⁽¹²⁾ said:

"I desire only to register my dissent from the view expressed by the Master of the Rolls that drivers 'are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care'. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take."

Slade J. in *Berrill v. Road Haulage Executive*⁽¹³⁾ said:

"Now, what is the duty of a driver of a motor vehicle? Paraphrasing the words of Lord Uthwatt in *London Passenger Transport Board v. Upson and Another*,⁽¹²⁾ it is really this. You are not bound to foresee every extremity of folly which occurs on the road. Equally, you are certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, albeit negligently."

It would seem clear from the authorities that the duty to take care hinges on the foreseeability of the event which is called into question and the likelihood of such an event causing injury to one's neighbour as defined by Lord Atkin in *Donoghue v. Stevenson*,⁽¹⁾ and that the test as to the degree or standard of care is always objective. This means that if in the eyes of the hypothetical reasonable man of ordinary intelligence and experience a motor accident is the foreseeable result of the act or omission complained of, and it is likely to injure some one who is so closely or directly affected by the act or omission that he ought reasonably to be in contemplation as being so affected, then the person responsible for the act or omission is liable in damages for negligence. On this basis, it is contended by counsel for the appellant that, as the colliding of the Opel car with the Fiat car was a foreseeable result of the Fiat car being parked on the roadside in the hours of darkness, and as such collision was likely to cause damage, the learned judge ought to have held that the third party contributed to the accident and was therefore liable in contribution. There could be some substance in that contention only if the Fiat car had been left on the roadside without its lights on.

As Lord Macmillan said in *Glasgow Corporation v. Muir*⁽¹⁰⁾ (at page 456), "the degree of care required varies directly with the risk involved", or to use His Lordship's words in *Read v. J. Lyons & Co., Ltd.*,⁽¹⁴⁾ "the law in all cases exacts a degree of care commensurate with the risk created". The risk must then be balanced against the measures necessary to eliminate it, and the practical measures which the defendant could have taken must be considered (see *Haley v. London Electricity Board*⁽¹⁵⁾). A practical and effective

measure which the third party in the present case could take in order to eliminate the risk of anybody colliding with his car was to have the lights of the car on. That he did take this practical and effective measure is clear from the evidence. The fact that he did not take the added precaution of leaving his car on the grass-verge did not render ineffective the precaution which he had in fact taken. The law does not require the highest degree of care of which human nature is capable. As Lord Alness said in *Vancouver General Hospital v. McDaniel and Anor.*,⁽¹⁶⁾ "a defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice".

As was stated by Lord Tucker in *Henley v. Cameron*⁽¹⁷⁾ the reason why a motor-car is required by law to carry a rear lamp during the hours of darkness is because a vehicle of this nature not so lighted is a potential danger to other road users, particularly the occupants of other motor-vehicles proceeding quite lawfully at speeds not contemplated in former times. In that case the defendant's motor-car, having run out of petrol by night, was left alongside the kerb of the highway with its front wheels projecting slightly towards the centre of the road. Later that night a motorcycle combination was found near the car, lying overturned across the road, the near side of the machine having struck the protruding off-front side of the car. The driver of the motorcycle combination died subsequently as a result of his injuries. On a claim by the widow of the driver, it was held that the accident was due partly to an unlighted obstruction on the highway at night and partly to the deceased man's failure to take proper care as he went along on his motor cycle combination, the liability of the defendant being fixed at two-thirds.

In *Hill-Venning v. Besant*⁽¹⁸⁾ the defendant stopped at night on a highway because the lighting system of his motor cycle had failed. The plaintiff riding his motor cycle with its head light dipped failed to observe the defendant's motor cycle in time to avoid it. It was not disputed that the plaintiff had been negligent. The Court of Appeal held that the defendant, by failing to remove his motor cycle off the highway, had not taken all reasonable precautions to prevent danger to other traffic and was therefore also negligent. The blame for the accident was apportioned as to two-thirds to the plaintiff and one-third to the defendant. In *Harvey v. Road Haulage Executive*,⁽⁶⁾ on a foggy morning, just after sunrise, the defendant's lorry was left pointing obliquely across the road with its near rear wheel five feet and the near front wheel seven feet from the nearside kerb. Visibility extended to 11 or 12 yards. After the lorry had been in that position for five minutes, the plaintiff riding a motor cycle, carrying a pillion passenger, at 18 to 20 miles an hour, ran into the defendant's lorry and was injured. It was held by the Court of Appeal that the parties were equally to blame. In *Brown v. Thompson*⁽²⁾ the driver of a motor-car and his wife, who was a passenger, sustained personal injuries as a result of running into the rear of a stationary lorry on an unlighted road at night. The lorry was unlighted and had no reflectors. The de-

fendant as the owner of the lorry was held 80% to blame for the accident.

It is to be observed that in each of the cases to which I have just referred, the party leaving his vehicle on the road was held liable on the ground that the vehicle had been left unlighted on an unlighted highway during the hours of darkness or when visibility was very limited. The liability in each case for the accident was fixed on the ground that the owner or driver of the vehicle had not taken all reasonable precautions to prevent danger to other traffic. I have not been able to find a single decided case where the owner or driver of a vehicle leaving it on the highway with its lights on has been held so liable.

In actions for personal injuries arising out of highway accidents it is particularly important to remember that the decision in every case turns upon its own facts. For example, there is no rule of law that a person driving in the dark is negligent if he cannot stop within the limit of his vision (see *Morris v. Luton Corporation*⁽¹⁹⁾). On the other hand, rule 28 of our Highway Code says:

"At night the distance that you can see an unexpected obstacle on an unlighted road is very limited. Anyone who drives at such a speed that he cannot stop within the range of his vision is driving dangerously."

And section 59(4) of the Road Traffic Ordinance, 1958 says that failure on the part of any person to observe any provisions of the Highway Code may in any civil proceedings be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings. I mention all this merely in passing, because there can be no doubt about the defendant's negligence.

Counsel for the appellant referred to rule 39 of the Highway Code which reads:

"Never leave your vehicle on the road close to a bend or road junction, near the brow of a hill, where it might hide a pedestrian crossing or traffic sign, in front of a fire hydrant, or across a driveway entrance to somebody's premises. If possible, park your vehicle off the roadway."

Quite naturally he laid emphasis on what is said at the tail end of the rule. But there is also rule 42 of the Highway Code, which is pertinent to this case and which the third party did observe. It says:

"Do not leave your vehicle without lights on a dark road at night. If your lights fail, move your car off the roadway as quickly as possible or obtain some emergency light to indicate its position."

The only other question left for me to consider is whether in dismissing the defendant's claim against the third parties the learned trial judge applied the rule of "last opportunity" which is said to have emanated from the principle enunciated in *Davies v. Mann*,⁽²⁰⁾ which has often been explained as amounting to a rule that, when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. In *Boy Andrew (Owners) v. St. Rognvald (Owners)*,⁽²¹⁾ Viscount Simon said that the suggested test of "last opportunity" was inaptly phrased and likely in some cases to lead to error. In truth, he said, there was no such rule, and that the question, as in all questions

A of liability for a tortious act, was, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong.

In *Davies v. Swan Motor Co. (Swansea) Ltd.*⁽²²⁾ Denning L.J. said that —

- (a) the so-called doctrine of "last opportunity" was not a principle of law, but a test of causation;
- B (b) it was a fallacious test, because the efficiency of the causes did not depend on their proximity in point of time;
- (c) since the recent speeches of Viscount Simon in *Boy Andrew*⁽²¹⁾ and of Lord du Parc in *Grant v. Sun Shipping Co., Ltd.*⁽²³⁾ it had no place even as a test of causation;
- (d) after the decision of the House of Lords in *The Volute*⁽²⁴⁾ and *Swadling v. Cooper*⁽²⁵⁾ it fell into disrepute and was superseded by the simple test: what was the cause, or what were the causes of the damage?;
- C (e) as a doctrine of law it was dead before the passing of the Law Reform (Contributory Negligence) Act, 1945, though it remained in use by some as a practical test; and
- (f) since that Act, it was no longer a practical test and should disappear from the books.

D Bucknill and Evershed L.J.J. in the same case (the latter, as at present advised) said that the rule applied in *Davies v. Mann*⁽²⁰⁾ was not affected by the provisions of the Law Reform (Contributory Negligence) Act, 1945. Evershed L.J. went on to say that the negligence of the plaintiff in that case had ceased to be an operating factor in the collision, and that at the material time the plaintiff, as a negligent actor, was *junctus officio*, one might say *junctus culpa*.

In *Harvey v. Road Haulage Executive*⁽⁶⁾ it was urged that it was a general rule that, if a lorry was negligently obstructing the highway, a motorist who negligently ran into it could not recover anything, not even a contribution. It was further urged that the unlighted vehicle cases, such as *Henley v. Cameron*,⁽¹⁷⁾ were an exception applicable in clear nights, but not applicable to a foggy morning when everyone should drive so as to be able to pull up within the limits of his vision and should so pull up as to not to hit anything. Lord Denning said at page 126:

G "I cannot accept this view. It seems to me to be a reversion to the doctrine of last opportunity which, as I have said before, in *Davies v. Swan Motor Co. (Swansea) Ltd.*,⁽²²⁾ and I repeat now, is obsolete. It cannot survive the effect of the Law Reform (Contributory Negligence) Act, 1945. No valid distinction can be drawn between negligence after seeing the danger and negligence in not seeing it. The only valid distinction in these cases is between conduct which is purposeful or reckless, and conduct which is merely negligent. If a motorist sees an obstruction in the road and purposely or recklessly runs into it, he can, of course, recover nothing, because it is wholly his own fault. But if he is merely negligent in not taking proper steps to avoid it, then the damage is the result, partly of his own fault in not avoiding the obstruction, but also partly of the fault of the other person who left the obstruction in the road."

I In *Henley v. Cameron*⁽¹⁷⁾ Tucker L.J., in considering the applicability of the Law Reform (Contributory Negligence) Act, 1945, in the light of *Davies v. Mann*,⁽²⁰⁾ said of that case:

"This case appears to me merely to be an example of the rule that the negligence of A does not absolve B from the duty to take reasonable care to avoid the consequences of A's negligence. It must always remain a question of fact

whether the negligence of B is 'so mixed up with' the state of things brought about by A's negligence as to make the negligence of both contributory causes to the accident. In *Davies v. Mann*⁽²⁰⁾ *supra* the jury may have thought that the original negligence of the plaintiff had been completely spent and that the ass in the position indicated in no way inconvenienced the defendant."

His Lordship then considered the case of *The Volute*⁽²¹⁾ in which Lord Birkenhead, having reviewed all the authorities on the matter, stated his conclusions in these words:—

"Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under *The Bywell Castle*⁽²²⁾ rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."

His Lordship then said that with the return of juries cases would no doubt often arise where the judge would have to consider the proper direction to be given to the jury since the passing of the Law Reform (Contributory Negligence) Act, 1945 in a case such as the case before him, and concluded: "So directed, I believe that a jury in the present case would find that the accident was due partly to the fault of the deceased and partly to the fault of the defendant, which continued right down to the moment of impact."

A short answer to this last question in this appeal is that there is nothing on record to indicate that counsel for the parties addressed the learned trial judge on the doctrine of "last opportunity" or that he considered it in arriving at his conclusions. The truth is that the defendant, according to his own admission, took a chance at avoiding the oncoming car. His story that the lights of the Fiat car were not on and that his headlights were dipped was rejected by the learned trial judge, in my judgment quite rightly, in view of the overwhelming evidence to the contrary. Indeed, as I have already said, the findings of fact made by the learned trial judge are not challenged. There was uncontradicted evidence that in the full beam of his Opel Kapitän the defendant, if he had been keeping a proper look-out, would have seen a white object at a distance of 890 feet, and a dark object at 699 feet. Moreover, the Fiat, apart from having its own side-lights on, must have been lit up by the headlights of the defendant's car as well as by the lights of the Volkswagen coming from the opposite direction.

It was suggested by counsel for the appellant that, if the lights of the Fiat were on, there was a possibility of the appellant thinking that they were moving lights, until too late. With respect to learned counsel, the appellant did not say so himself in the court below. It is true, as Mr. Caplan, counsel for the plaintiff, contended in *Harvey v. Road Haulage Executive*,⁽⁶⁾ that movement of a vehicle in front can only be judged by its relationship to other objects on or off the road, but in the present case the Volkswagen from the opposite direction was a moving object on the road. Moreover, that a stationary object in the path of one's

A car may be mistaken for a moving object is something which is reasonably foreseeable and which road users of experience are bound to anticipate.

B I have no doubt in my mind that the conduct of the defendant in attempting to pass in between the stationary Fiat and the oncoming Volkswagen was at least purposeful, if not reckless. As the learned trial judge rightly pointed out, the defendant took a chance which did not come off. In any event, this is a case where a clear line can be drawn between the earlier negligence of the third party, even if I were to assume that he was negligent, which I am not prepared to do, and the subsequent negligence of the defendant. In my judgment, therefore, the subsequent negligence of the defendant is the only one to look to, so that he was entirely to blame for the accident.

C For the reasons I have stated, I would dismiss this appeal with costs.

D Ali F.J.: The appellant, driving an Opel car from the direction of Ipoh to Kuala Lumpur, was involved in a collision with a Volkswagen car which was travelling from the opposite direction. As a result thereof, the driver of the Volkswagen was killed and several passengers therein were injured. The administratrix and widow of the deceased driver and those others who were injured have instituted separate actions claiming damages from the appellant. All these actions have been duly consolidated. The parties have all agreed on quantum of damages and the only question before the trial court was on liability. The appellant has brought in third parties, the owner and driver of a Fiat car respectively, claiming indemnity or contribution towards damages payable to the plaintiffs.

E The learned trial judge, after a careful consideration of all the evidence before him and having regard to the state of the parties' pleadings, found the appellant solely to blame and judgment was accordingly entered for the plaintiffs and the third parties. This appeal was originally against the whole of that judgment but at the hearing before us, the appellant decided not to proceed against the plaintiffs which means that the trial court's finding (this is implicit from the judgment) that the driver of the Volkswagen was not negligent, remains unchallenged and is not to be disturbed. Accordingly, in this appeal the only contestants on liability are the appellant and the third parties.

H The appellant's case against the third parties on the pleadings was in these terms:

"(B) OF KRISHNASAMY THE DRIVER OF CAR BC 8337.

- (a) parking his car on a main highway carrying fast moving traffic so as to cause a dangerous obstruction;
- (b) failing even to leave any parking or other lights to indicate his position thereon;
- (c) failing to give any other signals indicating his position on approach of the defendant and/or Teen Kim Teik aforesaid."

I In the light of the appellant's evidence at the trial, which I shall refer to presently, the defence case was that the Fiat car was such an obstruction that it caused the appellant to apply his brakes and swerve to the right. In so doing, he encroached into the wrong half

of the road. Hence the collision. This is what the appellant said at the trial:

"Suddenly, I saw a stationary car parked on my left hand side of the road blocking my way. I applied my brakes and swerved to my right to avoid hitting the stationary car."

Later in the cross-examination he said:

"The stationary car was fully on the road and in my way. In swerving to the right to avoid it, I encroached on the path of the oncoming car, but tried to keep as close to the stationary car as possible. I could not say how close. I took a chance at avoiding the oncoming car."

He admitted that his headlights "lit up a considerable distance" and that he was driving at between 45-50 m.p.h. In answer to questions by counsel for the third parties, he said the stationary car had its four wheels on the metalled road but he could not say how far it was from the edge of the road. In point of fact, he explained, he did not notice the stationary car before as he was looking at the oncoming lights. There was evidence that the Fiat had sustained a slight damage — some scratches or dents on its front offside door. The appellant did not recall hitting the Fiat. After the collision, the Volkswagen was found on the grass-verge on its proper side of the road. The Opel was on the grass but on its wrong side of the road with its body at right angles to the road. The Fiat, as found by the police investigating officer, was parked off the road on the grass-verge on its proper side facing Kuala Lumpur. The learned trial judge found that at the time of the collision or shortly before or after it the Fiat was parked on the road.

The appellant's defence was twofold in character. First, he sought to establish that the Fiat was an unlit obstruction. The allegation was that this car did not have its tail lights on. If it was meant to suggest that the tail lights, if on, would have enabled the appellant to notice the presence of the Fiat on the carriageway, the learned trial judge did not accept it for, in his judgment, he seems clearly satisfied that the headlights of the appellant's car and those of the Volkswagen were bright enough to enable him to see clearly what was ahead. I need only say here that there was evidence on which the learned trial judge could be so satisfied. I agree with him that all references to cases of unlit vehicles cannot be relevant to the consideration of the real issue involved in this case. On the basis that the appellant had failed to keep a proper or adequate lookout, the learned trial judge dismissed the appellant's claim against the third parties. Impliedly this means that the driver of the Fiat is not to be blamed for the accident or collision. But substantially the point in issue was whether the presence of the Fiat on the road was a causative factor of the accident. That is to say whether it had in any way influenced the accident. The answer to that question, of course, will not conclude the matter. For, the question still to be considered is whether the act of parking the Fiat on the road, was itself a negligent act which could give rise to liability for damages. In other words, are the third parties liable for common law negligence? I shall deal with this in the course of this judgment but for the present it is important to consider whether the appellant himself can be held liable. On the evidence as a whole, I have no doubt that he is. The learned

A trial judge has found him liable for not keeping a proper and adequate lookout. This is but one of the probabilities which can reasonably be inferred from the evidence given by the appellant himself. He said he saw the lights of the approaching cars and that he was driving at 45-50 m.p.h. I feel reasonably certain that he continued driving at this speed because he thought or assumed that he had a clear passage ahead of him. But unfortunately he was mistaken for he realised too late that there was a car parked on the road. Too late because, as he said at the trial, the choice was either to run into the Fiat and those persons standing beside it or to swerve to the right and take the chance of avoiding a collision with the Volkswagen. As it happened, he could not avoid the collision. This need not be so if he had slowed down so that in the event of any emergency arising, he would be able to take such action as might be necessary to avoid a collision or have proper control of his car. Motorists are not expected to anticipate all forms of follies on the road. As Lord Uthwatt said in *London Passenger Transport Board v. Upson*⁽¹²⁾ at page 173:

D "...A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take."

Besides motor vehicles, scooters, motor cycles, cycles and pedestrians also use the highways during the day as well as during the night. In one form or another they are all obstructions to other users of the road. Not to anticipate any of them to be on the road at night is to ignore the teachings of experience. In the circumstances I have no doubt, whatsoever, that the appellant is himself negligent and cannot, therefore, escape liability.

F I now turn to the third parties. Krishnasamy, the driver of the Fiat car stated in evidence that he stopped his car to ease himself. He claimed to have parked his car on the grass-verge. But this was not accepted by the learned trial judge who found that his car was parked on the road. Exactly where on the road is not stated in the judgment but clearly, in view of the evidence, somewhere near the left edge of the road. I say this because there was no suggestion, whatever, that the Fiat was being parked across the road or in such a manner as to be an obstruction to all forms of traffic on the road. Undoubtedly, it was an obstruction as far as the Opel was concerned for in order to pass through safely, the appellant would have to travel more towards the centre of the road. In paragraph 4 of his memorandum of appeal the appellant has suggested that the Fiat should have been parked on the grass-verge. I have no doubt that would be a wise thing to do. But even the foolish become wise after the event. We are not here concerned with the code of moral behaviour on the road. We are concerned with the law of negligence. By this I mean the common law. I cannot accept the appellant's proposition that at common law Krishnasamy was under a duty to park his car on the grass-verge. The existence or otherwise of such a duty can only be determined by applying the foreseeability test. Krishnasamy has said at the trial that after he left the car he heard the sound of a collision. This can only suggest

that when he stopped the car, the Opel and the Volkswagen were some distance away from the scene of the collision. It might well be that Krishnasamy had seen the head lights of the two approaching cars. But even so, he could not possibly have known what type of vehicles they were and at what speed they were travelling. In the circumstances he could not reasonably have foreseen that the two approaching cars would arrive simultaneously at the spot where the Fiat was parked. Nor could he reasonably have foreseen that there was going to be an accident. It might well be that he was aware of the risk involved in parking his car, as he did, on the road. The risk of an accident happening on the road is a possibility which every motorist has learnt to accept. As pointed out by Lord Porter in *Bolton and Others v. Stone*⁽¹¹⁾ at page 108:

"...The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."

It is not the law, said Lord Normand on page 1082, that precautions must be taken against every peril that can be foreseen by the timorous. From the same case the following passage from the judgment of Lord Reid at page 1086 seems most pertinent:

"...In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial."

I am unable to find in what Krishnasamy has done in this case anything which can be described as creating a risk which is substantial. The risk of a collision between the two approaching cars, had Krishnasamy been aware of it, could only be a remote possibility against which he is not in law required to take extraordinary precaution.

But one thing which seems clear to me in this case is that the presence of the Fiat had in fact contributed to the accident. The damage on its offside would fairly suggest that the Opel had grazed it while swerving to the right. To that extent it was a causative factor of the accident. But this does not necessarily mean that Krishnasamy is to be held liable for common law negligence. That he is not so liable has just been discussed upon a consideration of the foreseeability test. One decided English case in which the facts were substantially similar to the facts of the present case is *Kelly v. W.R.N. Contracting Ltd. & Anor.* (*Burke, Third Party*).⁽²⁷⁾ Although the trial judge, Ashworth J., in that case did not discuss in any great detail the common law negligence, I have no doubt that his conclusion on the facts was based on well established principles. In that case, the plaintiff was injured when the lorry in which he was a passenger skidded and crashed through a wall. He sued the owner of the lorry who brought in a third party, a Dr. Burke, whose car, a Ford Anglia, was, at the time of the accident, parked near the bend which the defendant's lorry was negotiating. Dr. Burke's car was parked with its nearside wheels on the pavement and its offside wheels in the carriageway which was 31 feet wide. Ashworth, J. found on the facts that Dr. Burke's car had a causative effect or influence on the accident. Notwithstanding that he was clearly of the

A view that Dr. Burke was not liable for common law negligence. At page 923 he said:

"There is nothing at common law which rendered Dr. Burke's conduct blameworthy in any respect. He had about two or three feet of his little Ford Anglia on the highway. The road at that place is 31 feet wide, and there was abundant room for any vehicle carefully driven to pass that car with safety. I have no doubt at all if the claim against Dr. Burke depended on common law negligence it would fail,..."

B I feel disposed to think that the same view must be taken of the facts of the present case. It is true that in that case Dr. Burke was held liable to contribute to the damages but this was because he was in breach of a statutory duty, having parked his Ford Anglia near the bend. In this case we are not considering any breach of statutory duty.

C Accordingly, I would dismiss this appeal with costs against the appellants.

Appeal dismissed.

Solicitors: *Dharmananda & Co.; K. A. Menon & Co.*

D

KONG NEN SIEW v. LIM SIEW HONG

[O.C.J. (Seah J.) January 25, 1971]

[Sibu — Matrimonial Cause No. 19 of 1970]

Chinese Customary Law — Foochow custom — Dissolution of marriage — Wife's incurable unsoundness of mind — Test of — Chinese Marriage Ordinance (Cap. 71, Sarawak 1948 Edn.) — Matrimonial Causes Ordinance (Sarawak Cap. 94), s. 1(2).

F

Family Law — Dissolution of marriage on ground that wife was incurably of unsound mind — Custody of children.

Evidence — Psychiatric nurse — Whether expert — Evidence Ordinance (Sarawak Cap. 54), s. 45.

G

There is a Foochow custom in Sarawak whereby a spouse may petition for dissolution of the marriage registered under the provisions of the Chinese Marriage Ordinance, on the ground that the respondent is suffering from an incurable mental illness which can be proved by admissible medical evidence by a competent witness. The test of what would constitute incurability of unsound mind is the same as in English law, namely her capacity to manage herself and her affairs including the problems of society and of married life and that she permanently lacked such capacity.

H

Cases referred to:-

- (1) *Randall v. Randall* [1939] P. 131 at p. 137.
- (2) *Lock v. Lock* [1958] 3 All E.R. 472.
- (3) *Whysall v. Whysall* [1960] P. 52.
- (4) *R. v. Majana bin Sumalag* (1957) S.C.R. 14.
- (5) *Yuill v. Yuill* [1945] P. 15.

I

PETITION FOR DISSOLUTION OF MARRIAGE.

Cheng Kwang Li for the petitioner.

Joseph C. C. Tang for the respondent.

Seah J.: The husband petitioned for dissolution of his marriage on the sole ground that the respondent wife was incurably of unsound mind. This allegation was contested by the wife.